

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LESLIE BERNARD HOWARD,

Plaintiff,

Civil No. 07-6306-ST

v.

RULE 12 ADVICE NOTICE

OFFICER D. SHERBONDY, et al.,

Defendants.

STEWART, Magistrate Judge.

Plaintiff filed a Complaint pursuant to 42 U.S.C. § 1983 in which he challenges the conditions of his confinement. Currently before this court is defendants' Un-enumerated 12B Motion to Dismiss (docket #29) based on plaintiff's alleged failure to exhaust his administrative remedies.

The Ninth Circuit has determined that inmates are entitled to notice under *Rand v. Rowland*, 154 F.3d 952 (9<sup>th</sup> Cir. 1998) before being required to respond to a motion to dismiss for failing to exhaust administrative remedies. See *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003). Accordingly, plaintiff is ADVISED as follows:

**NOTICE - WARNING**

***This Notice is Required to be Given  
to You by the Court***

Defendants have filed an unenumerated Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b) based on your alleged failure to exhaust your administrative remedies. Such a motion, if granted, will end your case.

When a party you are suing makes such a motion to dismiss for failure to exhaust that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says or make general allegations about what you may be able to prove. Instead, you must set out specific facts in declarations or other authenticated documents, that contradict the facts shown in the defendants' declarations and documents. If you do not submit your own evidence in opposition, and the defendants' evidence establishes that you did not exhaust your administrative remedies, defendants' motion to dismiss will be granted and your case will be dismissed.

**CONCLUSION**

Plaintiff may submit evidence in response to defendants' Motion to Dismiss (docket #29). The Under Advisement date remains September 16, 2008.

IT IS SO ORDERED

DATED this 20<sup>th</sup> day of August, 2008.

/s/ Janice M. Stewart  
Janice M. Stewart  
United States Magistrate Judge